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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 234-1998
April 30, 1998

INQUIRY RE: A decision by the Ministry of Health to refuse access to the applicant's surname at birth and the name of the applicant's birth mother

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on March 9, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by an applicant of the decision by the Ministry of Health (the Ministry) to refuse to disclose the applicant's surname at birth and the name of the applicant's birth mother. The applicant was adopted at birth.

2. Documentation of the inquiry process

On May 14, 1997 the Ministry received the following request from the applicant: "any and all records which contain my complete name at birth (i.e. Wanda...) whatever surname you severed from my original registration at birth". The Ministry responded on June 24, 1997. Records were disclosed to the applicant; however her surname at birth and the name of her birth mother were severed under section 22(1) of the Act.

On August 5, 1997 the applicant requested a review of the decision by the Ministry to sever information from her access request. The ninety-day time limit for the request for review expired on November 12, 1997. The Office requested a response from the applicant by October 21, 1997 regarding whether or not she wished to proceed to an inquiry. No response was received from the applicant on October 21, 1997, and the file was closed.

On December 18, 1997, my Office received a request for an inquiry from the applicant. Although the ninety-day time limit had expired, the Ministry consented to

holding the inquiry outside the ninety days. Notices of Written Inquiry were sent to both parties on January 28, 1998.

On February 18, 1998, the Ministry informed both the applicant and this Office that it would also be relying on section 3(1)(a) of the Act to withhold the applicant's surname at birth that is contained in a Supreme Court record.

3. Issues under review and the burden of proof

The issues under review are whether the Ministry appropriately used sections 22 and 3(1)(a) to withhold the applicant's surname at birth, and section 22(1) to withhold the name of the applicant's birth mother.

The burden of proof is on the Ministry to establish that the records fall within the scope of section 3(1)(a). Under section 57(2), if the record or part that the applicant is refused access to contains personal information about a third party, it is up the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. The relevant sections of the Act under review are as follows:

Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a records of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts.

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

4. The records in dispute

There are two records in dispute. The first is the "Registration of a Live Birth" (birth certificate) of the applicant. The applicant's surname, the name of her birth mother, and her birth mother's birthplace, residence at the time of the birth, mailing address, signature and doctor's name have been severed from this record.

The second is an "Identification Particulars of Adopted Child". The applicant's surname at birth has been severed from this record.

5. The applicant's case

The applicant believes that personal information is being unjustly withheld from her on a variety of grounds, including obtuse bureaucrats, the *Charter of Rights and Freedoms*, and the United Nations Convention on the Rights of the Child.

The essence of the applicant's case is that her last, or family name was given to her at birth and that it belongs to her and must be released to her now:

> I believe that my birth mother, birth father and I all share first party status in the matter of my conception and subsequent birth... My birth name was given to me at birth, it is not someone else's property, it is mine. How could giving back to me something that was taken away, stolen in fact, by the adoption process, be considered an invasion of privacy. (Submission of the Applicant, pp. 1 and 2)

The applicant views the Ministry's removal of her surname from the records disclosed to her as "an unreasonable denial of my Freedom of Information rights and an obstruction of my efforts to achieve my full information self-determination."

6. The Ministry of Health's case

The British Columbia Vital Statistics Agency provided the applicant with a copy of her birth registration and adoption records but severed all identifying information about the Applicant's birth mother, who has filed a disclosure veto pursuant to section 65 of the *Adoption Act*. (Submission of the Ministry, paragraphs 1.03 and 1.04)

The Ministry submits that it has properly applied the Act in the limited severances that it has carried out on the records disclosed to the applicant. I present below its submissions on the application of specific sections of the Act.

7. Discussion

The issue before me in this inquiry, who owns or controls the use of a surname acquired in child birth, is one of the most poignant contemporary issues in data protection, because it raises and arouses competing views of the most sensitive sort. As Privacy Commissioner, one does not like to be in the position of denying an applicant access to what can legitimately be construed as her own personal information, that is, her surname at birth. As a human being, I can understand the anguish that resulting distinctions arouse. I think that I understand, even if I cannot feel, the arguments of this applicant and of such groups as Parent Finders of Canada. Ultimately, of course, the

decision in this inquiry depends upon the application of the *Freedom of Information and Protection of Privacy Act.*

Section 3(1)(a): exclusion of court records from the scope of the Act

The Ministry relies on this section to withhold the "Identification Particulars of Adopted Child" because it is a court record, a copy of which is provided to the Vital Statistics Agency by the registrar of the Supreme Court of British Columbia. (Submission of the Ministry, paragraph 1.06)

The Ministry submits that the intent of this section was to respect the need of the Courts to supervise the disclosure of its records:

> ...the Public Body submits that section 3(1)(a) must be given a purposive interpretation so that regardless of whether an applicant is seeking access directly from a court or from a public body which happens to have a copy of "a record in a court file," the record will not be subject to the Act. Access to court records, other than court administration records, must be subject to the supervision of the Court. (Submission of the Ministry, paragraph 5.03)

The Ministry seeks to rely on my related decisions in Order No. 152-1997, March 4, 1997, which dealt with the meaning of "a record of a judge," and Order No. 170-1997, June 12, 1997, which concluded that a record of an Officer of the Legislature, like myself, is protected from disclosure so long as the record was created by that Officer or a member of his or her staff. (Submission of the Ministry, paragraphs 5.04 and 5.05)

Clearly, records in court files are specifically excluded from the application of the Act under section 3(1)(a). On a plain reading of section 3(1)(a) , the Act does not apply to a "record in a court file" but does apply to copies of those records sent to public bodies (subject to the application of certain exceptions in the Act). The Ministry advances a purposive interpretation of section 3(1)(a) and suggests that protection should not depend on who has custody of the record, relying on Order No. 170-1997, in support of that proposition. In Order 170-1997, I concluded that section 3(1)(c) applies regardless of who has custody or control of a record created by an Officer of the Legislature. There is, however, an important difference between the wording of subsections (a) and (c). The protection afforded by section 3(1)(c) is broader in the sense that it applies to records created by or in the custody of an Officer of the Legislature and that relate to the exercise of that officer's functions under an Act. In other words, the records need not be in the physical custody of an officer of the Legislature to be protected. In my view, section 3(1)(a) is limited in its application to records physically located in a court file.

Since the copy of the "Identification Particulars of Adopted Child" in issue is not physically located in a court file, I conclude that it does not fall within the scope of section 3(1)(a) and this record is not excluded from the application of the Act.

Section 22: Disclosure harmful to personal privacy of third parties

The remaining issue is whether the information severed from the two records, the "Identification Particulars of Adopted Child" and the "Registration of Live Birth", was properly severed on the basis of section 22(1) of the Act. The applicant's view is that this section cannot be used to keep her own information from her: "(m)y rights and needs are the most important and my need clearly outweighs any invasion of privacy that could result from restoring my birth name to me, the rightful owner of it." (Submission of the Applicant, p. 2)

The Ministry submits that the disclosure of the information in dispute would be an unreasonable invasion of the personal privacy of third parties, specifically the person identified as the birth mother in the records in dispute. (Submission of the Ministry, paragraph 5.08 to 5.13)

The Ministry submits as follows:

> ... the Act draws the line on the side of protecting the privacy of the third party; if even a summary [under section 22(5)] would reveal the identity of the third party who supplied the applicant's personal information in confidence, the applicant does not have a right to his or her own personal information.

Under section 63(1) of the *Adoption Act*, an adopted person 19 years of age or older may apply to the Director of Vital Statistics for a copy of his or her original birth registration and adoption order unless a disclosure veto has been filed under section 65 or a no-contact declaration has been filed under section 66. The filing of a disclosure veto precludes the Director of Vital Statistics from disclosing any information relating to the person who filed the veto. In this case, a disclosure veto was filed and only non-identifying information was released.

The applicant subsequently made a request for access to the identifying information under the *Freedom of Information and Protection of Privacy Act*. The Ministry submits that disclosure of this information will unreasonably invade the privacy of the applicant's birth mother.

The fact that the applicant's birth mother filed a disclosure veto under the *Adoption Act* is not entirely determinative, although it is a factor to which I attribute significant weight in determining whether disclosure would constitute an unreasonable invasion of the birth mother's privacy. I recognize, as well, that disclosure of this information would defeat the disclosure protections established under the *Adoption Act* and interfere with the birth mother's right to informational self-determination. Section 22(2)(f) is relevant because confidentiality was a vital component of the administration of this adoption. As the Ministry points out, the fact that the birth mother

has filed a disclosure veto under the *Adoption Act* reflects her desire and concern that identifying information remain confidential. I have also considered section 22(2)(h) on the facts of this inquiry.

In summary, I agree that disclosure of the identifying information would constitute an unreasonable invasion of the third party's personal privacy. I find that the applicant has not met her burden of proving that disclosure of the information in dispute would not be an unreasonable invasion of her birth mother's privacy. I conclude that the identifying information was properly severed under section 22(1) of the Act.

8. Order

I find that section 3(1)(a) does not apply to the "Identification Particulars of Adopted Child" record. I find that the Ministry of Health was required to sever information from the records in dispute on the basis of section 22(1) of the Act. Under section 58(2)(c), I require the Ministry of Health to refuse access to the information severed under section 22(1).

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David H. Flaherty
Commissioner

April 30, 1998